410 (*semble*); *cf. Shedeler* v. *State* (1891) 129 Ind. 523, 29 N. E. 36. And *a fortiori,* payment of the penalty under such circumstances accomplishes the same result. *Henry* v. *State, supra.* These decisions seem both practical and just. There is less probability of fraud in the proceedings than in the complaint. Furthermore, the complaint being valid, the accused may choose to waive his rights at the proceedings, and surely the failure of the court to give them to him should not deprive him of a plea of former jeopardy on subsequent indictment. The instant case, therefore, though correct in result is unsound in so far as it holds that irregular proceedings can never give rise to a former jeopardy.

EQUITY—SPECIFIC PERFORMANCE—INSOLVENCY OF THE DEFENDANT.—The defendant contracted to sell and ship to the plaintiff at a stipulated price certain quantities of coal, to be mined thereafter. The defendant later became financially embarrassed and failed to perform its contract. The plaintiff sued for specific performance. *Held,* the defendant's insolvency does not give equity jurisdiction to enforce such a contract. *Warren Co.* v. *Black Coal Co. et al.* (W. Va. 1920) 102 S. E. 672.

Some courts have stated that the insolvency of the defendant alone is a ground on which equity will decree specific performance of a contract relating to personalty because of the obvious inadequacy of the legal remedy. *McNamara* v. *Home Land & Cattle Co.* (C. C. 1900) 105 Fed. 202, (*semble*), reversed on other grounds (C. C. A. 1901) 111 Fed. 822; see *Parker* v. *Garrison* (1871) 61 Ill. 250, 253. There is, however, a strong line of cases in which the contrary has been held. *Gillett* v. *Warren* (1900) 10 N. Mex. 523, 62 Pac. 975; see *Union Co-operative Co.* v. *Adolfson* (1919) 103 Neb. 394, 171 N. W. 902; (1901) 1 Columbia Law Rev. 267. Specific performance may be denied when to grant it would prejudice the rights of innocent persons, although not parties to the contract or the suit. *Curran* v. *Holyoke Water Power Co.* (1874) 116 Mass. 90. And similarly, under certain circumstances, courts consider the insolvency of a debtor a bar to such equitable relief, since to grant it would result in injury to other creditors. *Chafee* v. *Sprague* (1888) 16 R. I. 189, 13 Atl. 121; *City Fire Ins. Co.* v. *Olmsted* (1866) 33 Conn. 476. Therefore, since to grant the plaintiff specific performance would convert him from a general creditor into a preferred creditor, the defendant's insolvency of itself should not entitle the plaintiff to maintain his suit.

EVIDENCE—RECITAL IN BOND—PROOF OF CONSIDERATION.—The obligee sued the obligor on a bond which recited as consideration the performance of a contract between the obligee and a third person to sell all of the obligee's cars to the third person. *Held,* one judge dissenting, parol evidence may be introduced to show that the true consideration for the obligor's promise was a sale of additional cars by the obligee to the third person, and that the contract recited in the instrument was not for the sale of all the obligee's cars. *Hocking Valley Ry.* v. *Barbour et al.* (App. Div. 1st Dept. 1920) 183 N. Y. Supp. 163.

The consideration as recited in the bond, providing for the obligee's performance of a contract obligation to a third person, was obviously invalid. The court, while recognizing that there was no consideration recited in the bond, nevertheless sought to apply the rule that where a consideration is recited in a contract, it may be varied by parol

evidence if such consideration is not an operative part of the contract. 4 Wigmore, Evidence (1904) § 2433; *Miller* v. *McKenzie* (1884) 95 N. Y. 575; *Wheeler* v. *Billings* (1868) 38 N. Y. 263. Inasmuch as the writing expressed no valid consideration, there was no question of varying the obligation of an existing contract. The rule applicable to the instant case is that parol evidence of consideration is admissible to show the inception of a contract. *Guidery* v. *Green* (1892) 95 Cal. 630, 30 Pac. 786. In negotiable instruments, although no consideration is expressed, the existence of consideration may always be proved *dehors*. *Board of Trustees* v. *Saunders* (1893) 84 Wis. 570, 54 N. W. 1094; *Packard* v. *Richardson* (1821) 17 Mass. 122. In the case of sealed instruments N. Y. Code Civ. Proc. § 840 provides that a seal is only presumptive evidence of consideration, and that evidence to disprove its existence is competent. Logically it follows that parol evidence is as well admissible to prove a consideration when the instrument failed to recite any. The result reached in the instant case is therefore correct.

FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—PARTIES OF RECORD.—The plaintiff brought an action against a New York corporation in the federal court for the Southern District of New York while a decree of the New York state courts was still in force declaring the plaintiff insane. Subsequently to the New York decree, and prior to this action, the plaintiff was adjudged sane in the state of his domicil. The court, following the New York rule, refused to permit the plaintiff to sue in his own name. Upon his request to substitute as plaintiff his committee, a New York citizen, *Semble*, such substitution would have destroyed the diversity of citizenship. *Chaloner* v. *New York Evening Post Co.* (C. C. A. 1920) 265 Fed. 204.

The court in the instant case follows the well settled rule that diversity of citizenship depends upon the personal citizenship of the parties of record and not upon that of the parties of interest. *Simson* v. *Klipstein* (D. C. 1920) 262 Fed. 823. This rule is applied to executors and administrators, guardians, trustees, receivers, *etc.*, suing in their own names and irrespective of whether title is or is not in them. See *Memphis Street Ry.* v. *Bobo* (C. C. A. 1916) 232 Fed. 708; *Johnson* v. *City of St. Louis* (C. C. A. (1909) 172 Fed. 31. Thus in jurisdictions where a committee must sue in its own name the citizenship of the committee determines the jurisdiction of the court. *Cf. Mexican Central Ry.* v. *Eckman* (1903) 187 U. S. 429, 23 Sup. Ct. 211. And where the committee must sue in the name of the insane person the citizenship of the latter is controlling. *Stout* v. *Rigney* (C. C. A. 1901) 107 Fed. 545; *cf. Toledo Traction Co.* v. *Cameron* (C. C. A. 1905) 137 Fed. 48. Exceptions have been made in the case of public officers suing on behalf of foreign citizens when the officer is a mere "conduit" through whom the law affords a remedy. *McNutt* v. *Bland* (1844) 43 U. S. 9; *Browne* v. *Strode* (1809) 9 U. S. 303. Although these cases are inconsistent with the general rule, they are followed notwithstanding. It would be sounder policy to make the citizenship of the parties for whose benefit the action is brought controlling, especially in the case of guardians and committees, since it is obvious that the rights of the person represented are being enforced.

INSURANCE—CONDITION—CONSTRUCTION.—In an action on a policy of insurance against loss from burglary, issued by the defendants to the